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In the Matter of: \*

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**Jeanne L. Huston** \*

Claimant \*

August 3, 1998

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against \*

Case Nos.: 97-LHC-2015/

98-LHC-2362

\*

**Ingalls Shipbuilding** \*

Employer/Self-Insurer \*

OWCP Nos.: 6-151466/

6-175212

\*

and \*

\*

**Director, Office of Workers'** \*

**Compensation Programs, United** \*

**States Department of Labor** \*

Party-in-Interest \*

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Appearances:

George W. Murphy, Esq.

For the Claimant

Paul B. Howell, Esq.

For the Employer/Self-Insurer

Marsha L. Semon, Esq.

For the Director

Before: **DAVID W. DI NARDI**

Administrative Law Judge

#### DECISION AND ORDER - AWARDING BENEFITS

This is a claim for workers' compensation benefits under the the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on April 24, 1998 in Gulfport, Mississippi at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

**Exhibit No.**

**Item**

**Filing Date**

CX 11	Claimant's letter filing	04/20/98
CX 11A	Notice of Receipt of original deposition of Tommy Sanders	04/20/98
RX 39	Copy of Attorney Howell's 4/29/98 letter to the District Director	05/04/98
CX 12	Copy of Attorney Murphy's 5/4/98 letter to the District Director	05/07/98
RX 40	Respondent's letter filing	05/19/98
RX 40A	Supplemental report of Tommy Sanders, C.R.C.	05/19/98
RX 41	Copy of Attorney Howell's 5/27/98 letter to the District Director	05/27/98
ALJ EX 24	This Court's Order (1) sending a copy of the hearing transcript to counsel of record and (2) establishing a briefing schedule on the applicability of Section 8(f) herein	05/29/98
RX 42	Attorney Howell's letter filing	07/06/98
RX 42A	Referral letter from the District Director	07/06/98
ALJ EX 25	Referral letter from the District Director relating to Claimant's companion claim	07/14/98
ALJ EX 26	Claimant's pre-hearing statement, Form LS-18	07/14/98
CX 13	Claimant's Letter filing	07/16/98
CX 13A	Claimant's Brief	07/16/98
RX 43	Respondent's Letter Filing	07/16/98
RX 43A	Respondent's Brief	07/16/98

The record was closed on July 16, 1998 as no further documents

were filed.

### **Stipulations and Issues**

#### **The parties stipulate (JX 1), and I find:**

1. The Act applies to this proceeding.
2. Claimant and the Employer were in an employee-employer relationship at the relevant times.
3. On October 26, 1992 and February 8, 1993 Claimant suffered back injuries in the course and scope of her employment.
4. The parties complied with all notice, claim and controversion provisions.
5. The parties attended an informal conference on November 19, 1996.
6. The Employer voluntarily and without an award has paid temporary total compensation from February 9, 1993 through August 5, 1996, and from September 18, 1996 through March 4, 1997 at a weekly rate of \$180.29, and permanent partial compensation from March 5, 1997 through the present at a rate of \$13.62 per week.
7. Claimant reached maximum medical improvement on January 16, 1997.
8. Claimant has suffered a forty-four percent permanent disability to her back/neck.

#### **The unresolved issues in this proceeding are:**

1. Causation of Claimant's cervical condition.
2. Causation of Claimant's disability from August 6, 1996 through September 17, 1996.
3. The nature and extent of Claimant's disability.
4. Average weekly wage.
5. The Applicability of Section 8(f) of the Act.
6. Attorney's fee.

### **SUMMARY OF THE EVIDENCE**

Jeanne L. Huston ("Claimant" herein)<sup>1</sup>, 48 years of age, with a Bachelor of Arts degree in Art from the University of Mississippi and a teaching certificate from Appalachian State University, and with an employment history of work as a high school teacher and as a receptionist, first became employed as a cable puller in the electrical department at Ingalls Shipbuilding ("Employer" herein) on October 15, 1992. Shortly thereafter, Claimant moved into the materials department as a material runner, a position which she kept until February 8, 1993. Ingalls Shipbuilding is a maritime facility located adjacent to the navigable waters of the Pascagoula River and the Gulf of Mexico where the Employer builds, repairs and overhauls vessels and ships. As a cable puller, Claimant's job was installing, pulling and carrying cable, and climbing, crawling and going anywhere in the ships that have cable that needs to be installed for the electrical part of the ship. As a material runner, Claimant's job was to deliver materials, pick up orders and parts, and ride a bicycle around the shipyard to all the different ships and climb up and find out what was needed and deliver the materials. (TR 38-41)

On October 14, 1992, the day before Claimant began work for Employer, Claimant was involved in a four car accident, the fourth car hitting her from behind. (TR 41)<sup>2</sup> Claimant went to the emergency room in Ocean Springs complaining of neck and back pain. Dr. Tamela Gartman, after conducting a physical examination, diagnosed acute cervical myositis. An x-ray of Claimant's C-spine showed C5-6 disc disease with degenerative changes. Dr. Gartman prepared a note which stated that Claimant should be able to return to work on October 16, 1992, but that she was limited to not lifting over ten pounds. (RX 2 at 1-10)

On October 26, 1992, Claimant was working on the SAR5 boat when her supervisor asked her to climb up on a bunk, check the number on a wire and report on her findings. When Claimant pulled up on the second bunk, she "flipped backwards headfirst into an open manhole." One of Claimant's co-workers grabbed her after she hit her neck, back and shoulder and falling headfirst into a thirty foot tank. (TR 42-43) Claimant was initially taken to the infirmary at Ingalls, but was then sent to the emergency room at Singing River Hospital.<sup>3</sup> Kenneth E. Canant, M.D. noted Claimant's fall at work, and also noted that Claimant "does have neck pain and pain to

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<sup>1</sup> Claimant was deposed on March 21, 1997. (RX 37)

<sup>2</sup> Claimant filed a claim against State Farm Insurance Company in relation to her October 15, 1996 automobile accident. The claim was settled in March of 1993 for the sum of \$25,000.00. (RX 2)

<sup>3</sup> Employer's First Report of Injury, Form LS-202, references an injury to Claimant's back but not her neck, although Claimant is "sure that [she] mentioned it." (TR 73-74, RX 7)

her scapula and a little bit of shoulder pain." After conducting a physical examination, Dr. Canant's diagnosis was of multiple contusions. Claimant was to take pain medication and Dr. Canant recommended two days off. An x-ray of Claimant's C-spine showed there were "changes of osteoarthritis and degenerative disc disease with disc space narrowing noted at C3-4, C4-5, and C5-6," and there is a notation that "[t]his may represent old trauma." No acute abnormalities were evident. An x-ray of Claimant's right shoulder/scapula showed that it was "intact without evidence of fracture or dislocation," and no other abnormalities were evident. A computed tomographic evaluation of the cranium demonstrated "normal cranial computed tomography with contrast enhancement." A bone scan revealed "mildly increased activity within the left aspect of the C7." An MRI of the cervical spine showed "probable chronic HNP's at C4-5 and C5-6 and to a lesser extent at C6-7," and mild to moderate spinal stenosis, but with no evidence of distortion of the cervical spinal cord." (RX 9)

On October 31, 1992, Claimant saw Chris E. Wiggins, M.D. Claimant related the October 14, 1992 car accident and the October 26, 1992 fall at work to Dr. Wiggins. The doctor noted that the car accident "was a neck injury primarily," and "the fall involved primarily her lumbar region." (RX 3 at 1). Dr. Wiggins' impression was of:

- 1) Cervical strain syndrome with pre-existing cervical degenerative disc disease. Rule out herniated cervical disc secondary to MVA 10/14/92.
- 2) Low back pain under treatment by Dr. Zielinski for industrial accident at Ingalls. Date of accident 10/26/92.

(RX 3 at 1) Claimant returned to see Dr. Wiggins on November 12, 1992, complaining of neck pain and palpable back spasms. Dr. Wiggins' impression was of cervical disc syndrome. (RX 3 at 2) Dr. Wiggins made the following recommendations:

- 1) I explained to her after she questioned the onset, that we usually view these as the patient having some pre-existing degenerative change and weakness in the neck with the problem aggravated and the symptoms brought on by the accident in question. She does appear to have a disc herniation to me and that can be caused by the accident.
- 2) Cervical occipital nerve block.
- 3) Cervical collar.
- 4) We discussed neurosurgical referral and she wants to go ahead and do that. Refer to Dr. McCloskey.
- 5) Usually for this problem we assign a 10% permanent partial disability of the body as a whole. (RX 3 at 2)

Claimant had a physical therapy evaluation on November 18,

1992. Rodney Nichols, RPT, noted that Claimant complained of pain on any lifting and pain over the right shoulder blade. Claimant reported that bending forward aggravates the pain, and that laying down eases and abolishes the pain. Evaluation showed two areas of pain, the first across Claimant's low back, and the second at Claimant's right shoulder across the supraspinatus muscle. A diagnosis of "lumbar and right shoulder contusion" was made, and the goal of physical therapy was stated "to decrease pain and restore pain free range of motion to these joints." The plan was to "[t]reat at Ingalls 3 times a week for 1 week with heat, ultrasound to low back and right shoulder." (RX 8)

On December 12, 1992, Claimant saw John J. McCloskey, M.D. Claimant's chief complaints were of neck, right shoulder and arm pain, numbness, and tingling radiating to the middle and ring finger of the right hand. Dr. McCloskey noted that Claimant's problem began as a result of her October 14, 1992 car accident, but there was no mention of the October 26, 1992 fall at work. After taking Claimant's medical history and performing a physical examination, Dr. McCloskey's impression was of "post-traumatic cervical radiculopathy (?C7 nerve root)." Dr. McCloskey recommended to Claimant that she consider having a myelogram. (RX 4 at 1-5)

Claimant was admitted to Singing River Hospital on January 22, 1993 for a complete myelogram. Dr. McCloskey's final diagnosis was of "post traumatic cervical syndrome with radiculopathy right arm," and "post traumatic low back syndrome." Claimant was discharged on January 23, 1993 with prescriptions for Lortab V and a Medrol dosepak. (RX 4 at 5-13) On January 27, 1993, Claimant returned to see Dr. McCloskey as she had "continual symptoms of pain across shoulders" and "neck pain radiating into occipital area." Dr. McCloskey recommended Claimant see Mike Rogers, and he prescribed Flexeril. (RX 4 at 14-17)

Following Claimant's fall on October 26, 1992, she was moved into the materials department as a material runner. (TR 40) On February 8, 1993, Claimant's first day on the day shift, Claimant was working in materials inventorying electrical equipment on the west bank on the wet dock with a co-worker. At some point, Claimant's co-worker walked off and did not return. Claimant continued to inventory the electrical equipment that was in a walk-in container, and as she was checking two metal boxes on the top shelf, they fell on her and knocked her down. Claimant was pinned down by the "very heavy boxes" for "maybe 20 minutes or so," until someone found her and an ambulance came to take her to Singing River Hospital. (TR 44-45)

Wayne P. Cockrell, M.D., initially treated Claimant when she was brought to the hospital. Dr. Cockrell took Claimant's medical history and performed a physical examination. The neurological examination was incomplete because of pain experienced by Claimant. Claimant would not allow Dr. Cockrell to "raise her feet over an

inch or two off the gurney saying that it would hurt her back to do that," and she "complained bitterly" when Dr. Cockrell palpated the lumbar area of her back." Dr. Cockrell diagnosed low back pain and Claimant was referred to Dr. McCloskey's service. (RX 27)

Dr. McCloskey treated Claimant for her injury, noting that the pain was in Claimant's "back - not in her legs." Dr. McCloskey also noted that Claimant informed him of her October 26, 1992 fall at work. After reviewing Claimant's medical history and conducting a physical examination, Dr. McCloskey's impression was of "recurrent low back strain" and "history of cervical disk disease." (RX 4 at 20-21) Dr. McCloskey prepared a discharge summary on February 11, 1993. A CAT scan of the low back showed degenerative changes. Claimant "ultimately settled down reasonably well and was discharged on Fioricet and Zantac," and an air back brace was to be provided. Dr. McCloskey's final diagnosis was of acute lumbosacral strain, chronic post traumatic low back pain and post traumatic cervical syndrome. (RX 4 at 28) Claimant has not returned to work following the February 8, 1993 accident. (TR 45)

On March 18, 1993, Claimant was seen by Harry A. Danielson, M.D. Dr. Danielson took the usual social, employment and medical histories, and performed a physical examination. (RX 28 at 1-2) For his impression, Dr. Danielson stated that:

I personally inspected the films of her Cervical and Lumbar myelogram of 1-22-93. She has a defect at C5-6, osteophyte with herniation. She has stenosis at the L2-3 level on her CT Scan and some at L4-5. She has facet arthropathy, a lot of arthritis in her back for her age. She has foraminal stenosis and osteophyte formation there at the C5-6 and C6-7 levels, and we usually find some disc herniation to account for the root filling defects. There are problems at C4-5, C5-6 and C6-7. It looks like she has a central disc at L3-4 and at L2-3. That in conjunction with her stenosis could be giving her back pain. She has multiple levels of trouble. I am referring her to Dr. Tate for psychological support and evaluation, and I will see her back after that.

(RX 28 at 2-3)

Claimant saw Dr. Danielson for a follow-up on May 6, 1993.<sup>4</sup> Claimant informed Dr. Danielson that she did not see Dr. Tate

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<sup>4</sup> The record contains a neurosurgical consultation by Dr. Danielson dated May 6, 1993 for a Jeanne R. Russell, although "Houston" was handwritten in over "Russell." (RX 28 at 4-5) It is clear, given the description of the patient in the report, that this neurological consultation is for a patient other than Claimant.

because her insurance company would not pay for her visit. Dr. Danielson prescribed Fioricet for pain and Robaxin 750 for spasms, and he also indicated that he would try to get Claimant scheduled for psychological support and evaluation. (RX 28 at 6)

On May 17, 1993, Claimant underwent a psychological evaluation by T. William Howard, PHD, ABPP. (RX 29) Dr. Howard noted Claimant's medical and psychiatric history, conducted psychological tests, interviewed Claimant and then concluded as follows:

"SUMMARY AND OPINION: All tests reflect her superior intelligence and education. There is no personality disorder or psychosis.

"However, there are signs of hysterical disorder which would involve emotional dependency and conversion ego defenses. Therefore, it is likely that her physical complaints have a marked emotional component.

"She, herself, is completely unaware of these psychodynamics, and she would resist psychological formulations of her symptoms. This occurs on an unconscious level, and is certainly not malingering.

"She would benefit from psychotherapy for her neurosis, but 'brief therapy' would be of little value. Treatment would require about three years.

"Of course, her neurosis do (sic)not mean she has no physical basis for her complaints; I am not competent to speak to that point beyond saying that a neurosis does not inoculate against somatic impairment.

(RX 29 at 2-3)

An August 23, 1993 report from Robert L. White, M.D., P.A., contains a review of Claimant's medical history, although no reference is made to the October 14, 1992 car accident. (RX 30 at 1-2). Dr. White, after performing a physical examination, provided the following impression:

- 1) Cervical and lumbar sprain, superimposed on cervical and lumbar stenosis.
- 2) Normal neurological exam. Therefore, no surgical indications.

(RX 30 at 2) Dr. White opined that Claimant would be able to return to work, probably with some restrictions, and that she had yet to reach maximum medical improvement. (RX 30 at 2) Dr. White saw Claimant again on December 9, 1993. He reviewed a myelogram and contrasted CT, and he noted that Claimant continued to complain of severe neck pain and some degree of radicular pain out her right arm with sensory symptoms, and mid lumbar pain with radicular pain into both posterior thighs. Dr. White stated that Claimant had "appropriate complaints and x-ray findings to consider decompression." (RX 30 at 3-4)

Claimant returned to see Dr. Danielson for a follow-up visit on October 19, 1993. Claimant was having back and neck pain. She described her pain to Dr. Danielson as "feeling like an ice pick sticking in her back, and it never stops." Dr. Danielson found that Claimant has multiple levels of trouble in her cervical and lumbar areas and needs to have a Cervical and Lumbar Myelogram. He gave Claimant a prescription for running shoes to give her feet proper support and make it easier on her back pain, and he also prescribed a queen size posturpedic mattress. (RX 28 at 7)

On November 2, 1993, Claimant had the Cervical and Lumbar Myelogram performed. (RX 28 at 10-11) Dr. Danielson saw Claimant on November 16, 1993, and he stated that he personally inspected the films of November 2, 1993, and the films of post-contrasted CT scans. Dr. Danielson found that there "are root filling defects and a pretty good sized disc herniation on the lateral film at the L2/3 level. It appears to be a central disc herniation. She has a lot of arthritic spur formation in her neck and some disc herniation. These osteophytes are pre-existing." He also stated that the

"Cervical CT Scan shows fairly extensive cervical spondylosis with osteophytes and posterior disc protrusions at C3/4 through C6/7. She also has disc herniation at L2/3, L3/4 and a bulge at L4/5." Claimant complained of neck pain, but Dr. Danielson wanted to fix her back before discussing her neck problems. Dr. Danielson indicated that Claimant desired to go forward with an interlaminar laminotomy, foraminotomy with microneurosurgical disc excision at L2/3, right, lateral and central. He prescribed Fioricet and Lorcet Plus for pain. (RX 28 at 13)

Dr. Danielson performed the procedures on December 29, 1993. The preoperative diagnosis was "central and lateral herniated disc with degenerative spondylosis L2-3 with median bar formation L2-3 level." The postoperative diagnosis was the "same with lateral herniated disc and ingrowth of facet and there appeared to be abnormal bone formation almost as though there had been a fracture at the L1-2 level and a foraminotomy was performed at that level as well." (RX 28 at 15-16) Claimant was discharged on December 31, 1993 with a final diagnosis of:

Central lateral herniated disc with degenerative spondylosis L2-3, with median bar formation L2-3 level, with the only abnormality at the L2 level with apparent foraminal stenosis at that level as well. Lateral disc herniation and ingrowth of facet. Abnormal bone formation L1-2 from possible prior fracture with foraminal stenosis.

(RX 28 at 18)

Claimant saw Dr. Danielson for a follow-up on March 8, 1994. She stated that her back was hurting her worse than it did the previous visit. Dr. Danielson indicated that he wanted to admit her to the hospital to get Cervical and Lumbar MRI Scans and a possible Cervical and Lumbar Myelogram because of her severe back and neck pain. The doctor prescribed pre-MRI valium. (RX 28 at 19) Claimant was seen again on April 21, 1994, and Dr. Danielson noted that he had personally inspected the films of her Cervical and Lumbar Myelogram of March 19, 1994, and films of post-contrasted CT Scans. Dr. Danielson found that, "on the myelogram, C5/6 and C6/7 looks worse than on the CT Scan. She has a lot of degenerative changes in her neck. It looks like disc herniation and spondylosis at C5/6, a calcific herniation. There is something at L4/5." Dr. Danielson indicated that Claimant desired to go forward with an anterior cervical discectomy and donor bone fusion at C5/6 and C6/7. (RX 28 at 20) Claimant continued seeing Dr. Danielson for follow-up visits until March 22, 1995, when the surgical procedures noted above were finally performed by Dr. Danielson. The pre and postoperative diagnosis was "herniated nucleus pulposus with extruded disc and moderately severe spondylosis, C5-6 and C6-7 levels." (RX 28 at 29) Claimant was discharged on March 24, 1995 with a final diagnosis of "herniated nucleus pulposus with extruded disc and marked

spondylosis, C5-6, C6-7." (RX 28 at 33).

Dr. Danielson provided a narrative report dated July 29, 1994 to George W. Murphy, Esq. (RX 28 at 21-23) The doctor reviewed Claimant's medical history up to that point in time and concluded:

Based upon this patient's history, the reliability of that history and the absence of any other trauma, it is my opinion with reasonable medical certainty that her herniated disc at C5-6 was significantly aggravated by her industrial accident at Ingall's on or about October 26, 1992; that her herniation at C4-5 is causally related to her industrial accident at Ingall's on or about October 26, 1992; that her herniations at L2-3 and L3-4 are causally related to her industrial accident at Ingall's on or about October 26, 1992; and that her herniation at L4-5 was causally related to her work injury of October 26, 1992 and significantly aggravated by her work injury of February 8, 1993.

(RX 28 at 23). Dr. Danielson provided a similar conclusion in a letter dated January 31, 1995 to Kelly House of F.A. Richard & Associates, the Employer's workers' compensation adjusting firm. (RX 29 at 26)

Claimant saw Robert E. Germann, M.D., P.C., on August 15, 1994. (RX 31 at 31-32) Dr. Germann noted Claimant's medical history, reviewed studies from January 22, 1993 and November 29, 1993, and conducted a neurological examination. His impression was of "neck pain, secondary to cervical spondylosis with a possible C6 radiculopathy on the right, at least by examination by (sic) not confirmed by EMG's and nerve conduction studies," and "low back pain status post laminectomy syndrome." Dr. Germann opined that "the cervical problem was a pre-existing condition aggravated by her two injuries at Ingalls since it appears all due to cervical spondylosis."

Dr. Danielson referred Claimant to Joe A. Jackson, M.D., for the pain in her arms. On September 26, 1994, Dr. Jackson conducted nerve conduction studies and found that Claimant had a right C5-6 root musculocutaneous injury. (CX 1F)

Dr. McCloskey, in a report dated October 16, 1994, summarized Claimant's treatment and responded to questions presented to him by Beverly Davis of the Curtis Group. Dr. McCloskey stated that "the severe degenerative changes in her neck and low back were present prior to any injury." He also stated that Claimant had "no history that her neck problems are due to anything other than the motor vehicle accident on October 14, 1992," and according to the history available to him, "her low back complaints are due to the two work injuries claimed above." Dr. McCloskey noted that there appeared "to have been aggravations of her back problems following her

February 8, 1993 industrial injury, but the complaints seem consistent and I think whatever complaints she has are attributable to the claimed work injuries." The doctor believed "that the degenerative changes in the cervical and lumbar region pre-existed any injury and are for the most part basically unchanged through the series of studies that she's had." Given Claimant's history, x-ray findings and complaints of severe right arm pain in the pattern described by Dr. Germann, Dr. McCloskey "would agree with surgical decompression." (RX 4 at 32-33)

In a letter to Pam Hale of F.A. Richard & Associates dated November 2, 1994, Dr. McCloskey stated that, based on Claimant's history, he thought "her neck and low back problems are unrelated." However, he did state that Claimant has "disability attributable to both and is more disabled from her back problems because of her neck problems than she would be if she didn't have the neck problems." (RX 4 at 34)

Claimant was seen by Dr. Danielson for numerous follow-ups subsequent to her March 22, 1995 operation. (RX 28 at 35-46) During this time, Claimant continually complained of severe neck and back pain. Claimant was seen by Dr. Danielson on November 13, 1995, and Dr. Danielson personally inspected films of Claimant's Cervical and Lumbar Myelogram of November 2, 1995 and films of post-contrasted CT Scans. He found a bad disc at C4/5. He also found that there was spondylosis with posterior osteophyte formation and narrowing at the intervertebral foramina at C4/5, and there were also changes at C5/6. Claimant and Dr. Danielson discussed having another surgical procedure or living with the situation. Dr. Danielson first wanted Claimant to try Gulf Coast Pain Institute for cervical evaluation and possible blocks. (RX 28 at 47)

On December 20, 1995, Claimant was examined by Dr. Robert Fortier-Bensen of the Gulf Coast Pain Institute. (RX 32) After taking the usual social and medical histories, and conducting a physical examination, Dr. Fortier-Bensen's impression was of:

- 1) Lumbar neuralgia. Degenerative disc disease.
- 2) Cervical neuralgia. Degenerative disc disease.
- 3) Rule out psoas muscle compartment syndrome, quadratus lumborum, iliolumbar, myofascial pain.
- 4) Moderately severe psychological factor including depression as well as insomnia.

(RX 32 at 3) Dr. Fortier-Bensen's treatment plan was to offer additional medications to help with pain. Claimant would be offered a "caudal epidural under flouroscopy and some injections into her cervical muscles." Claimant's psychological problems would be evaluated, and psychological help would possibly be offered if needed. (RX 32 at 3)

Claimant returned to see Dr. Danielson on March 21, 1996,

following her treatment at Gulf Coast Pain Institute. Claimant was still complaining of back and neck pain. After explaining the procedure to Claimant, she indicated she wanted to go forward with an anterior cervical discectomy with donor bone fusion at C4/5. (RX 28 at 48) The procedure was scheduled for September 4, 1996, but it was canceled "due to recurrent episodes of strep throat." Dr. Danielson would not perform an operative procedure of any type on Claimant while there was evidence of infection present. (RX 28 at 49)

Claimant sought treatment for her strep throat at the Coastal Family Health Center from May 1996 through August 1996. (RX 33, TR 53-54)<sup>5</sup> Dr. Okechukwu Ekenna saw Claimant on September 6, 1996 for treatment of her recurrent strep throat. After taking the usual medical and social histories and conducting a physical examination, Dr. Ekenna's impressions were of:

- 1) Normal pharynx on today's examination.
- 2) Likely allergic rhinitis with postnasal drip and possible chronic sinusitis by history.
- 3) Status post lumbar surgery in December of 1993 and cervical surgery in March of 1995.
- 4) Recent multiple antibiotic courses for suspected chronic pharyngitis.
- 5) Status post breast implant.

(CX 1I at 2) Dr. Ekenna indicated that he had spoken to Dr. Danielson about the findings. He noted that on examination, there was "no evidence for pharyngitis requiring any treatment." Dr. Ekenna "also explained that the finding of an organism in the throat does not necessarily mean infection." Dr. Ekenna, because of the concern for the surgery, recommended that Claimant be given antibiotic prophylaxis at the time of the surgery. (CX 1I at 2-3)<sup>6</sup>

On September 18, 1996, Dr. Danielson performed an anterior cervical discectomy, bilateral anterior foraminotomies and an intercorporeal fibular bone graft fusion. Dr. Danielson's postoperative diagnosis was "herniated and extruded disc with spondylosis C4-5 with extruded fragments and more spondylosis than I anticipated with core root compression." (RX 28 at 50-51)

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<sup>5</sup> Claimant testified that it was at this time that she received a letter from Employer stating that, due to her strep throat, they were going to discontinue her benefits until she was well enough to have the surgery recommended by Dr. Danielson which was initially scheduled for September 5, 1996. (TR 54) Employer's Notice of Suspension of Compensation Payments, Form LS-208, dated August 12, 1996 is in evidence at RX 17.

<sup>6</sup> Employer reinstated payments for temporary total disability on September 18, 1996. (JX 1, TR 54)

Claimant continued to see Dr. Danielson for follow-up visits and, on January 16, 1997, Dr. Danielson noted that Claimant "has undergone multiple operative procedures and still has a herniation at L4-5 and at C3-4 which are not at this time indicative of operative intervention but are certainly causing her some problems." Dr. Danielson opined that Claimant reached maximum medical improvement and he assigned her a 44% anatomical impairment rating of the person as a whole. Claimant "will need medication, physical therapy and possible medical devices, such as soft cervical collar, lumbar support, Tens Unit, etc. from time to time." Dr. Danielson stated that Claimant is "permanently totally disabled and unable to compete in the marketplace." (RX 28 at 60) However, on February 10, 1997, Dr. Danielson indicated that he felt Claimant could "work at her own pace sedentary type activity such as proof reading out of her home." (RX 28 at 64)

Dr. Danielson referred Claimant to Dr. Richard H. Smith for pain management. (CX 1L). Dr. Smith was deposed on April 9, 1998. (CX 8) He stated that Claimant's condition has been fairly stable with chronic pain. (CX 8 at 2) Dr. Smith agreed he would release Claimant to try to do some type of light or sedentary type work if she could perform the work. (CX 8 at 3) Dr. Smith stated that he would defer to Dr. Danielson with regard to Claimant's work limitations and her ability to work. (CX 8 at 4) The doctor admitted he was unaware of the October 14, 1992 car accident. (CX 8 at 5)

Richard E. Buckley, M.D., P.A., performed an independent medical evaluation of Claimant on October 29, 1997. (CX 1K) After the usual medical and social histories, and an examination of Claimant, Dr. Buckley had the following impression:

"This patient has had three operations on her spine without any good results, and has continued to complain of chronic, severe and inundating pain. I am sure that there is a great deal of psychological overlay, and yet she has had extensive surgery on her spine. It would be difficult to state that she does not have the pain. Based on her description of her ability to function, based on the amounts of surgery she has had, it would be my opinion she probably is unable to work in any capacity.

"Additionally, I do not recommend the Functional Capacity Evaluation. This patient cannot be examined appropriately because of the amounts of pain she states it produces, and I am certain that an attempt to do a Functional Capacity Evaluation would probably end up with her being in the hospital, or otherwise, having a severe exacerbation of her problem. I do not believe there is an answer to this patient's problem. I believe that she needs to continue seeing Dr. Smith, and continue to be supported.

"I feel that she probably needs extensive psychological and psychiatric support. Unfortunately she has been the gambit of pain

management and psychological consultations. It is difficult for me to predict with any confidence any sort of response to whatever treatment is recommended or afforded her. (CX 1K 3-4)

The reports of Dr. Danielson are supplemented by his deposition testimony which was taken on February 16, 1998. (RX 38) On direct examination by Claimant's counsel, Dr. Danielson stated that Claimant had a total combined 44% impairment rating from all her problems, minus 10% for the cervical 5/6 situation relating to her car accident. (RX 38 at 16-17) On cross-examination, Dr. Danielson agreed that it appeared, from his review of the contemporaneous records and the initial history he received, that the probability was that the low back problems were related to injuries at Ingalls and the cervical problems were probably related to the injury from the car accident. (RX 38 at 31-32)

Dr. Danielson agreed that Claimant's preexisting cervical problems would combine with and contribute to the effects of the low back injuries at Ingalls to render Claimant materially and substantially more disabled than she would have been as a result of the low back injuries at Ingalls alone. (RX 38 at 46-47) After reviewing documents relating to Claimant's October 14, 1992 car accident, Dr. Danielson opined that half of Claimant's 44% impairment was due to her injuries at Ingalls, while the other half was due to her car accident and/or preexisting cervical degenerative disease. (RX 38 at 47-49) On redirect, Dr. Danielson stated that the injury of October 26, 1992 is consistent with an injury where you could hurt your cervical area, and that it would be likely that you hurt or aggravate an injury to your cervical area with that type of injury. (RX 38 at 51-52)<sup>7</sup>

Jay Irvin Beasley, a long-time friend of Claimant, testified as to Claimant's limited functional ability and her need for assistance in performing many ordinary household chores. (TR 126-134)

Currently, Claimant testified that her back and neck hurt all the time, and that it feels like there is a railroad spike stuck in her back. She also explained that she has friends and neighbors who help her out with her chores. (TR at 50-52)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a for-the-most part credible, but obviously poorly-motivated Claimant, I make the following:

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<sup>7</sup> Objections made at the deposition of Dr. Danielson are overruled as the questions and answers related to issues which are relevant and material herein and as the objections really go to the weight to be accorded to those opinions by this Court.

## Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, *supra*, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that

(1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita, supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier, supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to her bodily frame, **i.e.**, her back and neck, resulted from working conditions at the Employer's shipyard. The parties have already stipulated that the Claimant suffered injuries to her back on October 26, 1992 and February 8, 1993. Claimant has established a **prima facie** claim that the harm to her back is a work-related injury. However, Claimant also alleges that she suffered neck injuries on the days she injured her back. The Employer asserts that Claimant did not suffer any neck injury on the days she injured her back. The question must now be addressed as to whether or not the Employer has produced substantial evidence to rebut the Claimant's assertion that she suffered a neck injury in addition to her back injury on October 26, 1992 and February 8, 1993.

## **Injury**

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. See 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing

condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos, supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

While Claimant has clearly established that she suffered a work related injury to her back, a question remains as to whether she also suffered an injury to her neck on October 26, 1992 and February 8, 1993. The Employer asserts that it has presented substantial evidence rebutting the Section 20(a) presumption that any work related injury to Complainant's neck occurred on October 26, 1992 and February 8, 1993. Thus, the primary question remaining is whether the Employer has presented substantial evidence rebutting the Claimant's 20(a) presumption, that she suffered additional harm to her bodily frame, her neck, on October 26, 1992 and February 8, 1993 as a result of the incidents at work, a question I shall now resolve.

The Employer's internal accident report, taken shortly after the October 26, 1992 accident, describes the injury as "thoracic back, contusion, bruise." (RX 6) There is no description of any neck injury. The Employer's first report of injury, Form LS-202 dated February 10, 1998, lists the injury as a fall backwards into a manhole, causing Claimant to hurt her back. (RX 7) No mention is made of any neck injury. In a physical therapy evaluation dated November 18, 1992, Rodney Nichols, RPT diagnosed lumbar and right shoulder contusion. (RX 8)

With regards to Claimant's February 8, 1993 accident, the

Employer's internal accident report, dated February 8, 1993, contains Claimant's statement of the accident. The report indicates that Claimant stated, "I was lifting junction boxes and strained my lower back." (RX 12) Again, no mention is made of any neck pain or injury. The Employer's first report of injury, Form LS-202, contains the same description of the accident and resulting lower back strain.

Claimant testified that she hit her neck, back and shoulder when she fell on October 26, 1993, and Dr. Canant, who treated Claimant on that date, noted Claimant's fall at work and also noted that she had neck pain, scapula pain and a little bit of shoulder pain. (RX 9)

Dr. Wiggins, who first saw Claimant on October 31, 1992, stated that Claimant's car accident "was a neck injury primarily," and "the fall involved primarily her lumbar region." (RX 3) Dr. McCloskey, who first saw Claimant on December 12, 1992 and who treated Claimant following her February 8, 1993 incident, stated that the severe degenerative changes in Claimant's neck and low back were present prior to any injury. He also stated that Claimant had no history that her neck problems are due to anything other than the October 14, 1992 motor vehicle accident, and that her low back problems are due to the two work injuries. In a subsequent report, Dr. McCloskey stated that, based on Claimant's history, he thought "her neck and back problems are unrelated." He also stated that Claimant has "disability attributable to both and is more disabled from her back problems because of her neck problems than she would be if she didn't have the neck problems." (RX 4)

Dr. Danielson first saw Claimant on March 18, 1993, and he treated Claimant until January 16, 1997. In a report dated July 29, 1994, Dr. Danielson stated:

Based upon this patient's history, the reliability of that history and the absence of any other trauma, it is my opinion with reasonable medical certainty that her herniated disc at C5-6 was significantly aggravated by her industrial accident at Ingall's on or about October 26, 1992; that her herniation at C4-5 is causally related to her industrial accident at Ingall's on or about October 26, 1992; that her herniations at L2-3 and L3-4 are causally related to her industrial accident at Ingall's on or about October 26, 1992; and that her herniation at L4-5 was causally related to her work injury of October 26, 1993 and significantly aggravated by her work injury of February 8, 1993.

(RX 28) However, in his deposition testimony, Dr. Danielson agreed that it appeared, from his review of the contemporaneous records and the initial history he received, that the probability was that the low back problems were related to injuries at Ingalls and the

cervical problems were probably related to the injury from the car accident. Dr. Danielson did agree that Claimant's preexisting cervical problems would combine and contribute to the effects of the low back injuries at Ingalls to render Claimant materially and substantially more disabled than she would have been as a result of the low back injuries at Ingalls alone. Dr. Danielson stated that the injury of October 26, 1992 is consistent with an injury where you could hurt your cervicle area, and that it would be likely that you hurt or aggravate an injury to your cervicle area with that type of injury. (RX 38)

Dr. Germann, who saw Claimant on August 15, 1994, diagnosed "neck pain, secondary to cervical spondylosis with a possible C6 radiculopathy on the right, at least by examination by (sic) not confirmed by EMG's and nerve conduction studies," and "low back pain status post laminectomy syndrome." Dr. Germann opined that "the cervical problem was a pre-existing condition aggravated by her two injuries at Ingalls since it appears all due to the cervical spondylosis." (RX 31)

Based on the record as a whole and in particular the evidence as summarized above, I find that the Employer has introduced specific and comprehensive evidence severing the connection between the alleged harm to Claimant's neck and her maritime employment. **See, e.g., Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986). **See also Universal Maritime Corp. V. Moore**, 31 BRBS 119, 123 (4th Cir. 1997). As a result of this conclusion, the presumption falls out of the case, does not control the result, and I must now proceed to weigh and evaluate all of the evidence.

This closed record conclusively establishes that the Claimant sustained a work-related injury to her back but did not sustain a work-related neck injury on October 26, 1992 or February 8, 1993. With respect to the injury to her back, the record establishes that this injury required lumbar surgery leaving Claimant with a permanent partial disability. This closed record further establishes that the Employer had timely notice of the injury, has authorized and paid for appropriate medical care and treatment for the injury and has paid certain compensation benefits to Claimant, as stipulated by the parties (JX-1), and that Claimant timely filed for benefits once a dispute arose between the parties.

With respect to the alleged injury to her neck, the initial loss reports filed by the Employer do not indicate any reported neck injury. Additionally, the medical records as summarized into the record and which I find credible, document that Claimant's cervical problems are a result of her October 16, 1992 automobile accident and her lumbar problems are a result of her work-related accidents. Drs. Wiggins, McCloskey and Danielson did not causally relate Claimant's neck difficulties with her October 26, 1992 and February 8, 1993 accidents, but rather found that such difficulties were the result of her October 14, 1992 automobile accident.

Although Dr. Danielson initially believed that Claimant's cervical condition was aggravated by her work-related accidents, he refined his opinion after reviewing the contemporaneous records and the initial history he received, and concluded that the probability was that the low back problems were related to injuries at Ingalls and the cervical problems were probably related to the injury from the car accident. (RX 38 at 31-32) Dr. Danielson did state that the October 26, 1992 injury is consistent with an injury where you could hurt your cervicle area and that it would be likely that you hurt or aggravate an injury to your cervicle area, however, he did not state that this was the case in Claimant's situation.

I find that the opinions of Dr. White are not probative as to the causation issue as there is no indication in his reports that he was even aware of Claimant's October 14, 1992 automobile accident. The reports of Drs. Buckley, Fortier-Bensen, Smith, Ekenna and Howard are not probative with regards to the causation issue, as they made no findings regarding the causation of Claimant's cervical and lumbar conditions as between the automobile accident and the two work-related accidents.

Although Dr. Germann opined that Claimant's cervical problem was a pre-existing condition aggravated by her two injuries at Ingalls, I find that the records of Dr. Danielson outweigh the opinion of Dr. Germann. Dr. Danielson's opinions are extremely credible and persuasive as he was Claimant's primary treating physician for almost four years and he was the physician who performed Claimant's lumbar and cervical surgeries. Accordingly, I find and conclude that Claimant did not sustain a neck injury while in the course and scope of her employment on October 26, 1992 and February 8, 1993. The principal issues remaining are the nature and extent of Claimant's disability and the determination of Claimant's average weekly wage, issues I shall now resolve.

### **Nature and Extent of Disability**

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to Claimant's age, education, industrial history and the availability of work she can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which she is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of her disability without the benefit of the Section 20 presumption.

**Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once Claimant has established that she is unable to return to her former employment because of a work-related injury or occupational disease, the burden shifts to the Employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which she could secure if she diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that she has tried to obtain employment, **Shell v. Teledyne Movable Offshore, Inc.**, 14 BRBS 585 (1981), she bears the burden of demonstrating her willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established she cannot return to work as a cable puller or as a material runner. The burden thus rests upon the Employer to demonstrate the existence of suitable alternative employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did submit credible and probative evidence as to the availability of suitable alternative employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore, find and conclude that Claimant is partially disabled on and after February 16, 1998, according to the second labor market survey provided by Employer, as shall be discussed below.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period of time and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding and Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so

that Claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipbuilding Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978), or that Claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell, supra**. See also **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 13 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13

BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on January 16, 1997, according to the well-reasoned opinion of Dr. Danielson. (RX 28) Accordingly, I find and conclude that Claimant was temporarily and totally disabled from February 9, 1993 through January 16, 1997. Further, I find that the Claimant was permanently and totally disabled from January 17, 1997 through February 15, 1998, as shall be discussed below.

### **Suitable Alternate Employment**

As the Claimant has met her burden of proving the nature and extent of her disability and her inability to return to work, the next question is whether the Employer can produce sufficient evidence to reduce Claimant's disability status from total to partial. An employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, this Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Turner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. V. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage earning capacity. **Cook, supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage

levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980). It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of her injury**. **Richardson, supra; Cook, supra.**

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

It is well-settled that the employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Respondents must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

This closed record contains a great deal of evidence concerning Claimant's residual capacity to work and the availability of suitable alternate employment. Both the Employer and Claimant have submitted evidence on this issue. As the burden of providing suitable alternate employment falls upon the Employer, I shall discuss its evidence first. I pause at the outset to note that as this case comes within the jurisdiction of the Fifth Circuit, the Employer need only produce a single job opening as evidence of suitable alternate employment. **P & M Crane Co. v. Hayes**, 930 F.2d 424, 24 BRBS 116, 121-22 (CRT) (5th Cir. 1991).

In the case at bar, the Employer has offered the reports and labor market surveys of vocational consultant Tommy Sanders,

C.R.C.<sup>8</sup> (RX 35) On March 4, 1997, Mr. Sanders performed a labor market survey resulting in four positions all in or around the geographic residence of Claimant.<sup>9</sup> In determining the proper job prospects, Mr. Sanders assumed Claimant had the capacity to perform a range of sedentary work activity, and he considered Claimant's age, education and prior work history and skills. Mr. Sanders also reviewed Claimant's employment application with Ingalls, her resume, and various medical reports of Drs. Ekenna, White, Germann, McCloskey, Danielson, Fortier-Bensen and Howard.

Employer submitted a follow-up labor market survey, dated February 16, 1998, which was also conducted by Tommy Sanders, C.R.C. (RX 35 at 4-5) The labor market survey consisted of the following four positions: cashier/collector, desk clerk, telemarketer and booth cashier. Mr. Sanders conducted another follow-up labor market survey, dated March 10, 1998, following his review of Dr. Danielson's February 16, 1998 deposition. (RX 35 at 6-8) Mr. Sanders, noting that Dr. Danielson vacillated with respect to Claimant's ability to return to work, was left with the impression that Dr. Danielson felt that if Claimant were motivated, she could at least attempt to return to a range of sedentary employment. The labor market survey consisted of three positions, including: desk clerk, receptionist and night auditor.

An additional labor market survey, dated March 25, 1998, was submitted by Employer. (RX 35 at 9-11). Mr. Sanders identified five positions including: customer service representative, appointment setter, receptionist and booth cashier. On May 8, 1998, Mr. Sanders provided an update to his March 4, 1997, February 16, 1998 and March 10, 1998 labor market survey's in order to provide entry wages on or about October 26, 1992 and February 8, 1993 for the corresponding jobs.<sup>10</sup>

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<sup>8</sup> Tommy Sanders, CRC was deposed on March 31, 1998. (CX 7)

<sup>9</sup> The positions were: telephone answering service operator, telemarketer, PBX operator and night auditor.

<sup>10</sup> The October 26, 1992 and February 8, 1993 wages are as follows: desk clerk with King's Inn was \$4.25 per hour; desk clerk with Days Inn was \$4.25 per hour; telephone sales with Olan Mills was \$4.25 per hour; telephone answering service operator at Answer Plus was \$4.25 per hour; receptionist at Continental Construction was \$6.00 per hour; night auditor with Hampton Inn was \$5.50 per hour, and booth cashier at Coastal Energy was \$4.50 per hour. Helig Myers did not have a store open in Pascagoula until February of 1993, but entry wages for other stores was \$4.50 per hour for both dates in question. The Gehl Group did not have the facility in Ocean Springs open during the dates in question, but prior job orders from the Gehl group identified wages for telemarketers as \$6.00 per hour for both dates in question. Wages for October 26,

Dr. Danielson was deposed on February 16, 1998, and he was questioned at length regarding Claimant's ability to work. (RX 38) On direct examination by Claimant's counsel, Dr. Danielson explained that, based on "just the records," Claimant should be able to do sedentary work, but when looking at the patient, "she's not able to compete and do even the sedentary kinds of things in fairness to her." (RX 38 at 17-19) He indicated that Claimant could not meet the physical demands of being a telephone answering service operator, PBX operator or telemarketer, and that, although "she could probably part time do clerk behind a desk or something...I don't know who would hire her, because she wouldn't be reliable to be there." (RX 38 at 21-23) On cross-examination by Employer's counsel, Dr. Danielson described Claimant's limitations. Initially, he stated that it would "have to do on a home kind of basis." He stated that Claimant cannot "walk for a long distance more than probably half a block," and that she needs to "change positions from sitting to standing to ambulating." The doctor also limited Claimant to occasional lifting of less than ten pounds. Dr. Danielson stated that if Claimant wanted to perform sedentary work, he would release her to do it. He would release Claimant to work as a cash collector or telemarketer, if she had the use of a head piece with a microphone, as it would allow her to move around while talking. Dr. Danielson also indicated that he would release Claimant to work as a desk clerk if she wanted to try that. Dr. Danielson did not think that a cashier/booth attendant position would give Claimant enough latitude to get up and walk around. (RX 38 at 35-42) The doctor candidly admitted that Claimant had some tendency to exaggerate. (RX 38 at 44)

The Claimant has also submitted evidence relevant to the issue of suitable alternate employment. The Claimant has submitted a vocational report prepared by Donald Woodall, M.S., CRC, L.P.C. (CX 2) Mr. Woodall interviewed Claimant and reviewed the reports of Drs. Wiggins, McCloskey, Smith, Ekenna, Buckley, Danielson and Howard, the records from Singing River Hospital and Memorial Hospital, and the labor market survey of Mr. Tommy Sanders, CRC. Mr. Woodall found that Claimant's "capacity to reenter the field of public school art teaching is nonexistent, without taking additional college courses and passing the National Teacher's Exam." Mr. Woodall also found that Claimant has "largely lost the ability to competitively use her past art talent in employment settings. Whatever related skills she retains can realistically only be used at work that pays in the minimum wage range." Based on Dr. Danielson's statement in his January 16, 1997 report that Claimant is totally disabled and unable to compete in the market place, Mr. Woodall stated that Claimant's "wage earning capacity is

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1992 and February 8, 1993 were not provided for the positions at Treasure Bay Casino, Seven Oaks Hotel, Prime Star, Tri-State Security and Alarms, Sand Hill Hospital or U.S. Travel Network. (RX 40A)

nonexistent. She is disabled and cannot be expected to work." Mr. Woodall reached a similar conclusion after reviewing Dr. Buckley's October 29, 1997 report. Mr. Woodall stated that the fact Claimant met the disability definition for Supplemental Security Income "is very consistent with the medical findings of both her treating and IME neurosurgeons, totally supports her allegations of pain and disability, and is very consistent with this counselor's observations and opinions in this matter." Mr. Woodall concluded by stating that he did "not find any other medical opinions from specialists who have timely treated or examined Ms. Huston offering any medical opinions that would support her capacity to perform any type of competitive work." (CX 2)

In my discussion of suitable alternate employment, I must first determine which, if any, of the positions offered by the Employer qualify as suitable alternate. Initially, I find that none of the positions described in the March 25, 1998 labor market survey constitute suitable alternate employment. Employer failed to provide the appropriate wage adjustments for the post-injury inflation for the positions at Pine Star, Tri-State Security and Alarms, Sand Hill Hospital and U.S. Travel Network. Although Mr. Sanders provided the wage rates for the booth cashier positions at Coastal Energy for the time periods in question, Dr. Danielson felt that such a position would not give Claimant enough latitude to get up and walk around. I accept Dr. Danielson's opinion that Claimant could not perform the position of booth cashier, as proof that it does not constitute suitable alternate employment.

Similarly, as Dr. Danielson stated that Claimant could not meet the physical demands of being a telephone answering service operator or a PBX operator, I find that those positions do not constitute suitable alternate employment. I also find that the telemarketer position at the Gehl Group does not constitute suitable alternate employment as there is no indication in the job description that Claimant would have the use of a headset, a condition Dr. Danielson specifically required if Claimant were to be employed in such a position. As the March 10, 1998 labor market survey indicates that the receptionist position at Continental Construction was filled, I remove that position from consideration. I also remove from consideration the night auditor position at Days Inn, as the labor market survey indicates that it is a part-time, hourly wage position, but no indication is given as to how many hours of work per week are required. Finally, I find that the night auditor position at Seven Oaks Gulf Hills does not constitute suitable alternate employment as Employer failed to provide the appropriate wage adjustments for post-injury inflation for that position.

I do, however, find and conclude that the cashier/collector position at Helig Meyers Furniture, the desk clerk positions at Hampton Inn and King's Inn, and the telemarketer position at Olan Mills Studio do qualify as suitable and alternate employment, and

are within Claimant's physical restrictions and capabilities. In view of the foregoing, and with the exceptions noted, I do accept the listed results of the labor market surveys because I determine that those jobs constitute, as a matter of fact and law, suitable alternate employment or realistic job opportunities. In this regard, **see Armand v. American Marine Corp.**, 21 BRBS 305, 311-312 (1988); **Horton v. General Dynamics Corp.**, 20 BRBS 99 (1987). **Armand** and **Horton** are significant pronouncements by the Board on this important issue.

Thus, as the Employer has shown the availability of suitable alternate employment within Claimant's restrictions, the burden now is on Claimant to show that she is ready, willing and able to return to work, just like any other unemployed worker. **See Palombo v. Director, OWCP**, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991).

Initially, I find and conclude that Claimant has the residual work capacity to perform the jobs identified by Mr. Sanders and which have been accepted herein as constituting suitable alternate employment for the Claimant. Dr. Danielson stated that he would release Claimant to perform some form of sedentary employment if she wanted to. He stated that he would release Claimant to engage in employment activities, so long as she could change positions from sitting to standing to ambulating, and as long as there was no lifting of more than ten pounds occasionally. I reject the vocational rehabilitation evaluation of Mr. Woodall because his conclusions are based, for the most part, on Claimant's exaggerated and subjective symptoms and because they are contradicted by the opinion of Dr. Danielson which supports the conclusion that Claimant is physically able to return to work in some capacity, if only she were motivated to return to work. Mr. Woodall did not have the benefit of Dr. Danielson's deposition testimony, which elaborated on Claimant's residual work capacity, when he made his findings. Although Dr. Danielson vacillates somewhat in his opinions, it is only because Claimant has not asked him to release her for trial sedentary employment. Only Dr. Buckley found that Claimant is probably unable to work in any capacity, but this finding is based in part on Claimant's exaggerated claims. I find Dr. Danielson's opinion to be the more persuasive on this issue.

This judge recognizes that a Claimant's credible complaints of pain alone may be enough to meet his or her burden to establish that he or she is unable to return to her usual work. **See Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Miranda v. Excavation Constr. Inc.**, 13 BRBS 882 (1981). The evidence in this case, however, militates against such a finding.

I find and conclude that Claimant has failed to establish that she has diligently sought employment within the jobs shown to be available. I agree with Employer that Claimant's lack of success has resulted from Claimant's lack of one hundred percent (100%) cooperation and from an unfocused job search. Claimant testified

that she has not filed written applications for any employment since she was released by Dr. Danielson as having reached maximum medical improvement on January 16, 1997, and she has not applied for any of the jobs found by Mr. Sanders. (TR 86-87) Claimant also testified that she has "not tried to return to work," as she is "in too much pain." (TR 94)

I find and conclude that Claimant is partially disabled from February 16, 1998, as she is capable of working, and has been provided a labor market survey that demonstrates suitable and available alternate employment. I do not set the date at March 4, 1997 as I have previously found that the jobs identified in the labor market survey of that date do not constitute suitable alternate employment. Further, I find that Claimant has not shown that she has diligently and in good faith sought employment, per the instructions of the Second Circuit in **Palombo**.

In view of the foregoing, I find and conclude the Claimant has a residual work capacity enabling her to work full-time, forty (40) hours a week, five days a week, and that her post-injury wage-earning capacity may reasonably be set at \$157.37, the post-injury adjusted entry level wage for these jobs<sup>11</sup> and that her October 26, 1992 and February 8, 1993 work-related injuries have resulted in a loss of wage-earning capacity of \$142.65 (\$300.02 - 157.37 = \$142.65). Claimant's compensation benefits for her permanent partial disability as of February 16, 1998, and continuing, shall be based upon such loss of wage earning capacity.

#### **Average Weekly Wage**

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir.

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<sup>11</sup> This figure was computed by averaging the weekly wages from the four positions from the February 16, 1998 and March 10, 1998 labor market surveys, retroactive to October 26, 1992 and February 8, 1993. The cashier/collector position at Helig Meyers Furniture earned \$220.00 per week (\$5.50 x 40 hours = \$220.00). The desk clerk position at Hampton Inn earned \$180.00 per week (\$4.50 x 40 hours = \$180.00). The telemarketer position at Olan Mills Studio earned \$102.00 per week (\$4.25 x 24 hours = \$102.00). Finally, the desk clerk position at King's Inn earned \$127.50 per week (\$4.25 x 30 hours = 127.50). Thus, the post-injury wage earning capacity equals \$157.37  $([\$180.00 + \$220.00 + \$102.00 + \$127.50] \div 4 = \$157.37)$ .

1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during **substantially** the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and Sons**, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. **Hole v. Miami Shipyards Corp.**, 12 BRBS 38 (1980), **rev'd and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. **See O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). **See also Brien v. Precision Valve/Bayley Marine**, 23 BRBS 207 (1990); **Klubnikin v. Crescent Wharf & Warehouse Co.**, 16 BRBS 183 (1984). Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. **See Waters v. Farmer's Export Co.**, 14 BRBS 102 (1981), **aff'd per curiam**, 710 F.2d 836 (5th Cir. 1983). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," **Duncan, supra**, but 33 weeks is not a substantial part of the previous year. **Lozupone, supra**. Claimant worked for the Employer for less than two weeks prior to her work-related accident on October 26, 1992, and for just under four months prior to her work-related injury on February 8, 1993. Therefore Section 10(a) is inapplicable.

The second method for computing average weekly wage, found in Section 10(b), cannot be applied because of the paucity of evidence as to the wages earned by a comparable employee. **Cf. Newpark Shipbuilding & Repair, Inc. v. Roundtree**, 698 F.2d 743 (5th Cir. 1983), **rev'g on other grounds** 13 BRBS 862 (1981), **rehearing granted en banc**, 706 F.2d 502 (5th Cir. 1983), **petition for review dismissed**, 723 F.2d 399 (5th Cir. 1984), **cert. denied**, 469 U.S. 818, 105 S.Ct. 88 (1984).

Whenever Sections 10(a) and (b) cannot "reasonably and fairly

be applied," Section 10(c) is applied. **See National Steel & Shipbuilding Co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1979); **Gilliam v. Addison Crane Company**, 22 BRBS 91, 93 (1987). The use of Section 10(c) is appropriate when Section 10(a) is inapplicable and the evidence is insufficient to apply Section 10(b). **See generally Turney v. Bethlehem Steel Corporation**, 17 BRBS 232, 237 (1985); **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Holmes v. Tampa Ship Repair and Dry Dock Co.**, 8 BRBS 455 (1978); **McDonough v. General Dynamics Corp.**, 8 BRBS 303 (1978). The primary concern when applying Section 10(c) is to determine a sum which "shall reasonably represent the . . . earning capacity of the injured employee." The Federal Courts and the Benefits Review Board have consistently held that Section 10(c) is the proper provision for calculating average weekly wage when the employee received an increase in salary shortly before his injury. **Hastings v. Earth Satellite Corp.**, 628 F.2d 85 (D.C. Cir. 1980), **cert. denied**, 449 U.S. 905 (1980); **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981). Section 10(c) is the appropriate provision where claimant was unable to work in the year prior to the compensable injury due to a non-work-related injury. **Klubnikin v. Crescent Wharf and Warehouse Company**, 16 BRBS 182 (1984). When a claimant rejects work opportunities and for this reason does not realize earnings as high as his earning capacity, the claimant's actual earnings should be used as his average annual earnings. **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Conatser v. Pittsburgh Testing Laboratory**, 9 BRBS 541 (1978). The 52 week divisor of Section 10(d) must be used where earnings' records for a full year are available. **Roundtree, supra**, 13 BRBS 862 (1981); **compare Brown v. General Dynamics Corporation**, 7 BRBS 561 (1978). **See also McCullough v. Marathon LeTourneau Company**, 22 BRBS 359, 367 (1989).

In the present case, Employer contends that the appropriate average weekly wage should be the minimum, \$270.43. Employer argues that Claimant did not work significantly during the fifty-two weeks prior to the injury, and she only worked at Ingalls for a few days before the first accident on October 26, 1992. (TR 36-37) Claimant, on the other hand, alleges an average weekly wage of \$318.77, which was determined by totaling the amount of Claimant's income for the period of time she was employed and dividing it by the number of weeks she was employed. (CX 12 at 10) In the alternative, Claimant argues that the average weekly wage should be determined by multiplying the hourly rate on the date of injury by forty, representing a forty hour work week. Claimant argues for an average weekly wage of \$334.00 under this method of computation. (CX 12 at 10)

I pause to note that an administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). **Sproul v. Stevedoring Servs. of America**, 25 BRBS 100, 105 (1991); **Waylord v. Moore Dry Dock**, 25 BRBS 53, 59 (1991); **Lobus v. I.T.O. Corp.**, 24 BRBS 137, 139 (1990).

Upon review of the documentary evidence and arguments by both parties, I reject Employer's request for an average weekly wage of \$270.43. While Claimant only worked for Employer for a short period of time prior to her accidents, I conclude that the average weekly wage endorsed by Employer would not adequately compensate Claimant for her wage-earning capacity at that time.

I also reject Claimant's request for an average weekly wage of \$334.00, based on multiplying Claimant's hourly wage of \$8.35 by forty (40) hours. Claimant's customary work week averaged 35.2 hours, not 40 hours.<sup>12</sup> This method inaccurately computes the average weekly wage in a method that inflates and distorts Claimant's actual average wage.

Rather, I find and conclude that Claimant is entitled to an average weekly wage of \$300.02. I base this upon Claimant's earnings at Ingall's, \$5100.34, divided by seventeen (17), the number of weeks Claimant worked at Ingalls. (RX 15) Claimant argued for this method of computation, arriving at an average weekly wage of \$318.77. It appears Claimant divided Claimant's earnings at Ingall's by sixteen (16) weeks. However, based upon the wage earning evidence, I find that the appropriate divisor is seventeen (17), as Claimant worked from October 15, 1992 until February 8, 1993. This takes into account the actual time Claimant worked and was compensated by Ingalls. (RX 15)

I find that the wage of \$300.02 adequately represents the fair and reasonable wage earning capacity for Claimant, based on her actual employment with Ingalls at the time of her second injury. I also note that the Benefits Review Board has held that it may be reasonable for an administrative law judge to focus only on the actual earnings of the Claimant at the time of injury in determining average weekly wage. **Hayes v. P&M Crane Co.**, 23 BRBS 389, 393 (1990), **vacated in part on other grounds**, 24 BRBS 116 (CRT) (5th Cir, 1991); **Harrison v. Todd Pac. Shipyards Corp.**, 21 BRBS 339, 344-45 (1988).

### **Medical Expenses**

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of

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<sup>12</sup> According to the figures in the wage statement provided by Employer, Claimant worked a total of 598.4 hours. When this is divided by the 17 weeks Claimant worked, from October 15, 1992 to February 8, 1993, Claimant's average hours worked comes out to 35.2 hours.

the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for her work-related injuries. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978). As already found above, the Employer is not responsible for any medical expenses related to Claimant's neck injury as her cervical problems resulted from her automobile accident and are not causally related to her maritime employment.

### **Interest**

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

### **Intervening Event**

Another issue in this case is whether any disability herein is casually related to, and is the natural and unavoidable consequence of, Claimant's work-related accident or whether the recurrent episodes of strep throat constituted an independent and intervening event attributable to Claimant's own intentional or negligent conduct, thus breaking the chain of causality between the work-related injury and any disability she may now be experiencing.

The basic rule of law in "direct and natural consequences" cases is stated in Vol. 1 **Larson's Workmen's Compensation Law** §13.00 at 3-348.91 (1985):

When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause [event] attributable to claimant's own intentional conduct.

Professor Larson writes at Section 13.11:

The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.

The simplest application of this principle is the rule that all the medical consequences and natural sequelae that flow from the primary injury are compensable . . . The issue in all of these cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications. (*Id.* at §13.11(a))

This rule is succinctly stated in **Cyr v. Crescent Wharf & Warehouse**, 211 F.2d 454, 457 (9th Cir. 1954) as follows: "If an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury." **See also Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mississippi Coast Marine, Inc. v. Bosarge**, 632 F.2d 994 (5th Cir. 1981), **modified**, 657 F.2d 665 (5th Cir. 1981); **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981).

Likewise, a state court has held: "We think that in this case the claimant has produced the requisite medical evidence sufficient to establish the causal connection between his present condition and the 1972 injury. The only medical evidence presented on the issue favors the Claimant." **Christensen v. State Accident Insurance Fund**, 27 Or. App. 595, 557 P.2d 48 (1976).

The case at bar is not a situation in which the initial

medical condition itself progresses into complications more serious than the original injury, thus rendering the added complications compensable. **See Andras v. Donovan**, 414 F.2d 241 (5th Cir. 1969). Once the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable as long as the worsening is not shown to have been produced by an independent or non-industrial cause. **Hayward v. Parsons Hospital**, 32 A.2d 983, 301 N.Y.S.2d 649 (1960). Moreover, the subsequent disability is compensable even if the triggering episode is some non-employment exertion like raising a window or hanging up a suit, so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances.

However, a different question is presented when the triggering activity is itself rash in the light of claimant's knowledge of his condition. The issue in all such cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications, and denials of compensation in this category have invariably been the result of a conclusion that the requisite medical causal connection did not exist. **Matherly v. State Accident Insurance Fund**, 28 Or. App. 691, 560 P.2d 682 (1977). The case at bar does not involve a situation in which a weakened body member contributed to a later fall or other injury. **See Leonard v. Arnold**, 218 Va. 210, 237 S.E.2d 97 (1977). A weakened member was held to have caused the subsequent compensable injury where there was no evidence of negligence or fault. **J.V. Vozzolo, Inc. v. Britton**, 377 F. 2d 144 (D.C. Cir. 1967); **Carabetta v. Industrial Commission**, 12 Ariz. App. 239, 469 P.2d 473 (1970). However, the subsequent consequences are not compensable when the claimant's negligent intentional act broke the chain of causation. **Sullivan v. B & A Construction, Inc.**, 122 N.Y.S.2d 571, 120 N.E.2d 694 (1954). If a claimant, knowing of certain weaknesses, rashly undertakes activities likely to produce harmful results, the chain of causation is broken by his own negligence. **Johnnie's Produce Co. v. Benedict & Jordan**, 120 So. 2d 12 (Fla. 1960). Nor is this a case involving a subsequent incident on the way to the doctor's office for treatment of the original work-related accident. **Fitzgibbons v. Clarke**, 205 Minn. 235, 285 N.W.2d 528 (1939); **Laines v. WCAB**, 40 Cal. Comp. Cases 365, 48 Cal. App. 3d 872 (1975). The visit to the doctor was based on the statutory obligation of the employer to furnish, and of the employee to submit to, a medical examination. **See Kearney v. Shattuck**, 12 A.D.2d 678, 207 N.Y.S.2d 722 (1960).

The Benefits Review Board reversed an award of benefits to a claimant who had sustained an injury to his left leg, when he fell from the roof of his house after his injured knee collapsed under him, while attempting to repair his television antenna. Eighteen months earlier this claimant had injured his right knee in a work-related accident, such claimant receiving benefits for his

temporary total disability and for a rating of fifteen percent permanent partial disability of the leg. The Board reversed the award for additional compensation resulting from the second injury. **Grumbley v. Eastern Associated Terminals Co.**, 9 BRBS 650 (1979). The Benefits Review Board held, "[U]nder Section 2(2) of the Act, the second injury to be compensable must be related to the original injury. Therefore, if there is an intervening cause or event between the two injuries, the second injury is not compensable. Thus, this Administrative Law Judge must focus on whether the second injury resulted 'naturally or unavoidably.' Therefore, claimant's action must show a degree of due care in regard to his injury." Furthermore, the Board held, "[c]laimant obviously did not take any such precautions, nor did the record show that any emergency situation existed that would relieve claimant from such allegation." **Grumbley, supra**, at 652.

Applying these well-settled legal principles to the case at bar, and based upon the totality of the record, I find and conclude that Claimant's recurrent episodes of strep throat were not intervening causes and, **a fortiori**, they did not break the chain of causality between Claimant's work-related incidents and her present condition. Accordingly, I find that the Employer is responsible for disability benefits between August 6, 1996 and September 17, 1996, as Claimant's recurrent episodes of strep throat were not independent and intervening events breaking the chain of causality between Claimant's work-related disability injury and any disability she may now experience as she was still unable to work during that period of time. However, as Claimant's recurrent strep throat was not caused by or related to her employment or her work-related injuries, the Employer is not responsible for any medical expenses relating to Claimant's recurrent strep throat.

Employer argues that benefits were suspended from August 6, 1996 to September 17, 1996 because Dr. Danielson recommended a third surgery in March of 1996, and that as Claimant did not have the surgery for over six months, there was an unnecessary delay. Employer also argues that the surgery on Claimant's cervical area was unrelated to any injury arising out of employment, and that the records show that Claimant was not under treatment for strep throat during the entire period in question.<sup>13</sup>

I find that the Employer's arguments on this issue are unpersuasive. With regards to Employer's assertion that the cervical surgery recommended by Dr. Danielson is unrelated to an

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<sup>13</sup> Employer's Notice of Suspension of Compensation Benefits, Form LS-208, stated that the reason for suspension of benefits was "non-industrial medical problems." (RX 17) Similarly, the Notice of Controversion stated that compensation benefits were stopped because of "non-industrial throat problems keeping comp claim from progressing." (RX 20)

injury arising out of Claimant's employment, Dr. Danielson was treating the cervical condition as a work-related injury at the time. Furthermore, Pam Hale, claims adjuster for F.A. Richards and Associates, Inc., indicated in an August 12, 1996 letter to George Murphy, Esquire, that compensation was being stopped because of Claimant's strep throat, not because the surgery was for an unrelated cervical condition. (EX 20 at 2)

I also reject the Employer's contention that there was an unnecessary delay in Claimant following up on that surgery. Dr. Danielson discussed the cervical surgery with Claimant on March 21, 1996, at which time she agreed to undergo the procedure. (RX 28 at 48) Dr. Danielson's next report is not until September 5, 1996, when he notes that the surgery scheduled for September 4, 1996 was canceled due to Claimant's recurrent episodes of strep throat. (RX 28 at 49) Claimant sought treatment for her strep throat at the Coastal Family Health Center from May 1996 through August 1996. (RX 33) Dr. Danielson indicated that he would not perform any operative procedure of any type on Claimant while there was evidence of infection present. He also stated that Claimant would have to obtain clearance from Dr. Ekenna, with whom Claimant had a September 6, 1996 appointment, before he would consent to perform her operation. (RX 28 at 49) Dr. Ekenna examined Claimant on September 6, 1998, and he advised Dr. Danielson that Claimant be given antibiotic prophylaxis at the time of surgery. (RX 33) Dr. Danielson performed the surgery on September 18, 1996. (RX 28 at 50-51)

The medical evidence shows that there was no unnecessary delay by Claimant in following up on the surgery, and that she was being treated for strep throat during the period in question. Claimant first agreed to the surgery on March 21, 1998. She was being treated for strep throat from May of 1996 until September of 1996, and Dr. Danielson refused to perform the surgery as long as Claimant had evidence of infection present. Claimant's cervical surgery was performed within two weeks of her examination by Dr. Ekenna. I find that the medical evidence, as set forth above, establishes that the delay in performing Claimant's cervical surgery was based on valid medical concerns given Claimant's health during the relevant time periods. Dr. Danielson, Claimant's treating physician, made it clear that the delay in surgery was necessary given Claimant's strep throat. No evidence has been presented which would establish that Claimant's strep throat affected her lumbar and cervicle conditions in any way, or that the delay in the performance of the surgery had any impact on said conditions. The fact remains that Claimant was totally disabled during that time period and she is certainly not the first Claimant to experience a personal illness while out on disability.

#### **Section 14(e)**

Claimant is not entitled to an award of additional

compensation, pursuant to the provisions of Section 14(e), as the Employer has accepted the claim, has authorized certain medical care and has voluntarily paid certain compensation as stipulated by the parties. Although voluntary compensation benefits were suspended from August 6, 1996 through September 17, 1996, Employer timely filed a Notice of Controversion. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

#### **Section 8(f) of the Act**

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. See **Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), rev'd and remanded on other grounds sub nom. **Director v. Berstresser**, 921 F.2d 306 (D.C. Cir.

1990); **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, *supra*, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, *supra*.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron)**, *supra*.

In cases where a Claimant is partially disabled, the employer must demonstrate that the current permanent, partial disability "is materially and substantially greater than that which would have resulted from the subsequent injury alone." **33 U.S.C. §908(f)**; **Metropolitan Stevedore Co. v. Rambo**, 515 U.S. 291, 293 (1995); **Director, OWCP v. Bath Iron Works Corp. [Johnson]**, 129 F.3d 45, 51 (1st Cir. 1997); **Director, OWCP v. Ingalls Shipbuilding, Inc.**, 125 F.3d 303 (5th Cir. 1997).

I have previously found the Claimant is permanently and

partially disabled. Accordingly, the Employer has the heavier burden of proving that the current permanent, partial disability is materially and substantially greater than it would be based on the October 26, 1992 and February 8, 1993 injuries alone.

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked since October 15, 1992 as a cable puller for the Employer, (2) that she was diagnosed with acute cervical myositis and C5-6 disc disease with degenerative changes which pre-existed the October 26, 1992 and February 8, 1993 work-related injuries, (3) that Claimant received a twenty-two (22) percent disability rating as a result of the prior automobile accident and/or preexisting cervical degenerative disease, (4) that she was released to return to work on October 16, 1992 by Dr. Gartman with the work restriction of no lifting over ten pounds, (5) that she sustained injuries to her back on October 26, 1992 and February 8, 1993 while working at the Employer's shipyard, (6) that Claimant received a twenty-two (22) percent disability rating as a result of her injuries at Ingalls and (7) that Claimant's permanent partial disability is the result of the combination of her pre-existing permanent partial disability (**i.e.** her cervical impairments) and her October 26, 1992 and February 8, 1993 injuries as such pre-existing disabilities, in combination with the subsequent work injury, have contributed to a materially and substantially greater degree of permanent disability, according to the well reasoned report and deposition of Dr. Danielson. (RX 28, RX 38 at 46-47) **See Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to her final accident on February 8, 1993, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C&P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982). As noted, the Employer hired Claimant after she had been released to return to work after her automobile accident.

Even in cases where Section 8(f) is applicable, the Special fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special fund, on monies paid in excess of its

liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

### **Attorney's Fee**

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer. Claimant's attorney has not submitted his fee application. Within thirty (30) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's counsel who shall then have twenty (20) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after November 19, 1996, the date of the informal conference. Services performed prior to that date should be submitted to the District Director for her consideration.

### **ORDER**

Based on the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for her temporary total disability from February 9, 1993 through January 16, 1997, based upon an average weekly wage of \$300.02, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on January 17, 1997 through February 15, 1998, Employer shall pay to the Claimant compensation benefits for her permanent total disability, plus the annual adjustments, based upon an average weekly wage of \$300.02, such compensation to be computed in accordance with Section 8(a) of the Act.

3. Commencing on February 16, 1998, the Employer shall pay to the Claimant compensation benefits for her permanent partial disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon the difference between her average weekly wage at the time of injury, \$300.02, and her wage-earning capacity after the injury, \$157.37, as provided by Sections 8(c)(21) and 8(h) of the Act.

4. The Employer's obligation is limited to the payments of 104 weeks of permanent benefits and after cessation of payments by the Employer, continuing benefits shall be paid, pursuant to

Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

5. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of her October 26, 1992 and February 8, 1993 work-related injuries.

6. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injuries referenced herein may require, even after the expiration of the time period in Order provision 4, subject to the provisions of Section 7 of the Act.

7. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

8. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have twenty (20) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on November 19, 1996.

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**DAVID W. DI NARDI**  
Administrative Law Judge

Dated:

Boston, Massachusetts

DWD:jgg